26189

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS,
PETITIONER.

versus

ANN WARNER, ET ALS.,
RESPONDENTS.

Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

BRIEF FOR RESPONDENTS.

STATEMENT.

This is the New Orleans drainage case, and facts therein, prior to the matters involved in the present review, have been so frequently stated by the Court, in Warner vs. New Orleans, 167 U. S., p. 467, and in New Orleans vs. Warner, 175 U. S., p. 120, that a repetition thereof would be unnecessary, and hence we will only notice what has transpired since the case was before this Court the last time, as reported in 175 U. S., pp. 120 and 176;

U. S., p. 92. Upon filing the mandate of this Honorable Court in the Circuit Court (R. p. 99), the decree of the Circuit Court of Appeals was duly entered in said Circuit Court and the case was referred to a master in accordance with the directions therein contained (R. p. 93), and after due proceedings had, said master found that the following named parties had proved their claims for the following amounts (R. pp. 102 to 106):

John Crosseley & Sons, Limited	$149,000 00
Wilder & Company	7,000 00
F. J. Gasquet	30,000 00
Suffolk National Bank, of Boston	60,000 00
Mrs. Frank N. Butler and Mary E. Taliferro	5,000 00
John J. Donaldson	2,000 00
Mrs. Eliza J. Lytle, dative tutor	12,000 00
John G. Warner, Ann Warner, *et als.*, substituted, complainants	6,000 00
James Jackson	45,000 00

The master having come to this conclusion drafted his report and exhibited the same to all parties in interest, to which the only exception filed, or objections made, were those of defendant, a copy of which are to be found on page 39 of the appendix of this brief, as well as at page 108 of the record herein.

These exceptions were duly considered by the master, and disposed of in a supplemental report (R. pp. 106 to 108), who overruled the same, adhered to the conclusions as expressed in his report as first drafted and exhibited, and returned said reports into Court, together with all the proceedings had and evidence adduced before him (R. pp. 109 to 143).

Thereafter the defendant filed the same exceptions to said master's report in the Circuit Court (a copy of which is to be found on page 40 of the appendix to this brief, also at page 143 of record), which, by agreement of counsel (R. p. 145), were corrected as to the allegation in reference to $20,000.00 of warrants therein stated to have been issued "in payment of work done by Van Norden," so as to allege that the same were issued

"in satisfaction of that amount of drainage taxes collected by the City of New Orleans prior to June 6, 1876, and applied to general fund purposes," the allegation in the exception as filed before the master, and as filed in the clerk's office (R. p. 108), being:

> "That of said warrants, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in payment of work which had been done by the said Van Norden; that is, digging canals and building levees, which at the time of the passage of the said act had not been surveyed or measured by the city surveyor."

While the allegation, as corrected, and as it was argued to the Court (R. p. 144) was:

> "That of said warrants, besides those issued in settlement of said claim for damages, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the City of New Orleans prior to June 6, 1876, and applied to general fund purposes, and hence, as to these warrants, there could be no recovery or allowance made."

But these exceptions, filed in the clerk's office, by their express terms, only apply to the intervenors and not to complainant, and contain no prayer for any relief whatever.

After argument and due consideration by the Court, said exceptions were overruled, the master's report was approved and confirmed and judgment was rendered in favor of the parties named by said master for the respective amounts by him reported as aforesaid, with 8 per cent. interest per annum from June 6th, 1876, until paid, except James Jackson, as to whom further action were reserved (R. p. 145).

From this an appeal was asked, accompanied with an assignment of error (a copy of which is found at page 42 of the appendix hereto), and was allowed, without *supersedeas*, to the United States Circuit Court of Appeals (R. pp. 149 to 152), but no appeal was ever effected or completed as to John J. Donaldson, one of the intervenors in whose favor there was judgment of $2,000.00 with interest at 8 per cent. per annum from June 6,

1876, and costs; as to whom no appeal bond was ever given in the Circuit Court, nor was any attempt ever made in the United States Circuit Court of Appeals to supply this omission by furnishing a new bond; and as to whose judgment there never was any complaint by any application for the writ of *certiorari* herein. This will more fully appear by reference to page 80 of the record herein, where the petition for said writ twice gives the names of the parties against whom it is filed, and among them the name of Donaldson does not appear. The decree of the Circuit Court as to said Donaldson, neither complained of by appeal to the Circuit Court of Appeals, nor by petition for writ of *certiorari* herein is, therefore, beyond examination or review herein.

The italics in said copy of said assignment of error, in said appendix hereto, are not in the original filed by the defendant on taking said appeal to the United States Circuit Court of Appeals, but are made by counsel to call attention to the difference between the matters set forth in the exceptions presented to the master and those filed to the master's report in the Circuit Court on one hand, and an attempt to raise and have decided, on appeal, matters never raised before either the master or before the Circuit Court, as to the appraisement of the claim for damages and moneys misappropriated, but this will be discussed hereafter.

Argument.

I.

We had supposed—and we still believe—that notwithstanding the contention to the contrary, and notwithstanding the fact that each and all of the mythical, visionary, so-called points of the other side have not, in detail, been noticed by this Court, that something has been decided in this case. We believe it has been judicially determined by the United States Circuit Court of Appeals and by this Honorable Court, although it did not, *seriatim*, and in detail, notice in its exhaustive opinion, in the 175

U. S. p. 120; 176 U. S. R. p. 92, each of the nineteen so-called errors; that all matters thought to be embraced therein, whether of substance or of vision, as well as any and all others that might or could be raised, have been decided; that it has been decided that the notarial act of June 7, 1876, under which the drainage warrants therein mentioned were issued, whether the same be called for the purposes of abbreviation and convenience, by counsel in their arguments, or by the Courts in their opinions, an act of sale, or of purchase, or transfer, or of compromise, was, in all things legal and valid; that for the considerations therein named, the Canal Company and Van Norden, its transferee, transferred and conveyed to the defendant the dredgeboats and paraphernalia therein named; that it settled Van Norden's claim for damages therein stated; that it effectually terminated what the defendant had always asserted to be a most onerous contract on its part for the draining and reclaiming the lands therein embraced, and that it compromised for $20,000.00 in drainage warrants, $24,000.00 if not $26,000.00 of cash collected by the defendant and by it most wrongfully diverted from the drainage fund to which it belonged, and that each and all of the drainage warrants issued under said notarial act were and are legal and valid obligations of the defendant.

That under said notarial act the city legally acquired the dredgeboats, machinery and appliances, and is liable to the extent of $153,750.00 of the drainage warrants issued under said notarial act is not denied, but is in fact admitted as late as the present application for the writ of *certiorari* herein.

That the city settled Van Norden's claim for damages was a matter set forth in the bill of complaint (R. p. 10) in said notarial act, which was annexed to and made part of said bill (R. pp. 10, 36 and 39), and was admitted in defendant's answer (R. p. 24); the allegations in said bill, in said notarial act and in said answer being as follows:

The bill, at page 10, paragraph 14, alleged:

"14. * * * That by Act No. 16 of the Legislature

of Louisiana, * * * made part hereof, the City of New Orleans was authorized and empowered to contract with the said * * * Canal Company and said Van Norden, as transferee thereof, for the purchase of its transferee's *rights,* franchises, tools, implements, machines, boats and apparatus, * * * and after due appraisement, on the 6th day of June, 1876, said purchase was made by said city by notarial act, a copy of which as well as of an inventory of the property sold and the ordinance under which said inventory was made, are hereto annexed and made part hereof and marked transfer I, inventory 1, and ordinance to 3479, A. S. ——" etc.

And said notarial act declared (R. p. 37) that said * * * Canal Company and said Van Norden, its transferee and pledgee—

"Do, by these presents, grant, bargain, sell, convey, transfer, assign and set over and unto the City of New Orleans * * * *all* and singular, the rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages which said * * * Canal Company has or may have under and by virtue of said Act 30 * * * and all other acts of the Legislature of this State," etc.

Then follows the recital of the sale of the dredgeboats by said Van Norden, individually, to said city, all of which said act declared said city was—

"To have and hold the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of said * * * Canal Company and said Van Norden, transferee and pledgee, * * * unto the said City of New Orleans forever, by virtue of these presents."

After subrogating said city to all the rights, actions and remedies of said grantors, and declaring that—

"The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages * * * are made and accepted for and in consideration of the price and sum of three hundred thousand ($300,000) dollars, payable in drainage warrants."

Said notarial act (at page 39), further declared that said sum

was in full settlement of all claims for damages (although it has again and again been denied orally, and in printed arguments, that in said notarial act there was any reference to the settlement of any claim for damages) in the following unmistakable and sweeping language:

> "And the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said W. Van Norden, as transferee and pledgee, aforesaid, and in his own name individually, declared that they have covenanted and agreed, and do, by these presents, covenant and agree, that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the * * * Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually, ever had, or have now, or may have, against the said City of New Orleans."

And said notarial act annexed to and made part of the bill of complaint as aforesaid, at page 41, further declared:

> "That inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said City of New Orleans will issue to the said Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same."

And the defendant's answer in response to the bill of complaint, with the said notarial act annexed as part thereof, (at page 24,) admitted the acquisition by the city of all in said act set forth as follows:

> "And further answering this defendant says, that in 1876, * * * by Act No. 16 of that year was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by this defendant of the dredgeboats, rights, franchises and other property of the company for a price in drainage warrants delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by the purchase from

and surrender of the said franchises by said company and its assignee, as shown by said legislative act, and act of purchase, a copy of which is filed with the bill, to which reference is made."

This notarial act thus alleged and made part of and filed with the bill with the full effect of all the recitations, covenants, transfers, conveyances and settlements therein contained, and thus admitted in the defendant's answer, was, without opposition, offered in evidence (R. 172, Oct. Term of 1899, p. 206; No. 19, referable to and usable under 10th article of agreement of solicitors herein, found at page 167 of the present Record), as well as the three drainage warrants of complainant Warner, of $2,000.00 each (No. 172, Oct. T. 1899, p. 205), issued under said notarial act. On these allegations of the bill, on the answer of the defendant thereto and on the proofs offered, the following decree was rendered by the United States Circuit Court of Appeals (R. p. 95 and 96):

"This cause came on to be heard on the transcript of the Record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

"On consideration whereof, it is now ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed and this cause remanded to said Circuit Court with instructions to enter a decree as follows, to-wit:

"1. It is ordered that the City of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6000, with 8 per cent. interest thereon, from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

"2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to

said city under authority of Act No. 16 of the Legislature of the State of Louisiana, approved February 24, 1876.

"That it be referred to one of the masters of the Court to take and state an account of all of said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof, and to examine witnesses touching all such matters.

"In taking and stating said account, the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places as with those against the owners of private property, with interest thereon, as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in execution of the trust, but that no offset be allowed for bonds issued in exchange for drainage warrants under the Act of 1872.

"4. It is further ordered, that said master give thirty days' notice by advertisement in a newspaper published in the City of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

"And it is further ordered, that said warrant holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions or to obtain special leave of the Court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

"5. It is further decreed, that upon the coming in of the master's report and its confirmation, the complainant and all those who have established their claims under the fourth clause of this decree, will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, and shall be entitled to have execution therefor.

"It is further ordered, that complainant and all other parties in interest have leave to apply to the Court for such other and further orders as may be necessary from time to

time to carry this decree into full effect, and that defendant pay all costs of this suit.

"It is further decreed, that the defendant, the City of New Orleans, be condemned to pay the costs of this cause in this Court, for which execution may issue out of said Circuit Court."

And this decree was in "all respects affirmed" by the Supreme Court of the United States, 175 U. S. p. 120; 176 U. S. p. 92; and the mandate of said Supreme Court ordered that the cause be remanded to the Circuit Court, with a direction to comply with the decree of said Circuit Court of Appeals (R. p. 101).

In short, this decree, thus affirmed and ordered to be complied with, provided as follows:

1st. Judgment for Warner for $6000, payable out of drainage assessments.

2nd. That said assessments were a trust fund for the payment of said Warner, and other holders of warrants, issued under the act of sale from Van Norden and the Canal Company to the City of New Orleans, made under the authority of Act No. 16 of the Legislature of 1876.

3rd. That the case be referred to a master to take an account of said assessments.

4th. That said master give thirty days' notice to *all* holders of said warrants to prove their claims before him.

5th. That upon the filing and confirmation of said master's report, complainant and those who had proved their claims as aforesaid, were entitled to absolute judgments against said city for the full amount of their warrants and interest, if said accounting showed sufficient assessments due to pay them in full, and if not, then to *pro rata* judgments.

It established the validity of the notarial act and of the warrants issued thereunder, for both were alleged in the bill, offered in proof and passed upon by the Court, and only left open the establishment of the holdings of the other warrants, the amount of assessments from which they were to be paid, and hence the determination of whether they were to be paid in full, or *pro rata*.

Has the Circuit Court, with the assistance of the master and by its own decree, complied with the direction contained in the mandate of the Supreme Court of the United States? If it has, there can be no error in its decree, or in the decree of the Circuit Court of Appeals affirming the same.

There has been and can be no complaint of the reference to the master, nor of the directions therein contained, for they are in the precise language of said decree, with the solitary addition of the name of the master. There has been no objection, and there was no exception anywhere to the proof, or the holdings of said warrants; and in fact when, and as, the warrants were proved, offered and filed with said master by the various holders there was no objection whatever urged against any of them, nor was there any exception or objection to the amount of assessments proved and reported to be due by the city or individuals, nor that said assessments were not greatly more than sufficient to pay all the warrants proved, in full, nor that the decree of the Circuit Court is not based exclusively on the master's report as filed. The first objection that was made, was in the way of an exception filed with the master (R. p. 108; also p. 39 of the appendix to this brief) to his report as first drafted, and it was, that the advantages of the aforesaid decree extended only to warrants aggregating $153,750, which were those first on the amount issued, and which it was contended were issued in payment of the purchase of the dredgeboats, and hence were purchase warrants, and as to the balance of said warrants, which it was said were issued in settlement of a claim for damages and for work done should have been rejected, because not purchase warrants in any sense.

As before stated, these exceptions were overruled by the master (and we invite attention to his able supplemental report in so doing), and upon adhering to his report as originally drafted, the same exceptions—but on the claims of intervenors only and not on claim of complainant—with the correction heretofore noted (R. p. 143), were repeated and filed in the clerk's office,

and as before stated were overruled by the Circuit Court, the said report was confirmed and decree rendered for the amounts reported.

The above contention is in direct opposition to the very terms of the decree to which said exception refers, for it provides that the assessments therein mentioned are a—

> "trust fund * * * for the purpose of paying the *claims of complainant and other holders of the same class of warrants issued under the act of sale from Van Norden, transferee, to said city authority of Act No.* 16 *of the Legislature of the State of Louisiana, approved February* 24, 1876."

The correctness of this part of the decree was directly challenged by the 15th assignment of error filed in this honorable Court on March 14, 1899, the day after the case was argued and submitted, by permission (R. p. 74).

And the master was directed to give notice, not to the holders of $153,750 of said warrants to appear before him and establish their claims, but to—

> *" all holders of warrants issued as aforesaid."*

whom, said decree declared, were entitled to establish their warrants before said master without reference to formal interventions, and entitled to judgment in full in case the fund was sufficient upon proof of their claims.

There was, and is, no objection to the form of notice which the master issued to the other holders of like as complainant, nor is there any contention that the warrants presented to, and admitted by, the master were not like those of complainant, and issued under the same notarial act; nor is it contended that any of them had been paid; nor that the assessments named in said decree were not more than sufficient to pay them in full. The exceptions, and the contention based thereon, are not against the acts and doings of the master, made in pursuance of the directions in said decree contained, but against the decree itself, affirmed in all respects by this Court and by it ordered to be complied with.

It is true said decree is in favor of Warner alone (and as to

his claims there is no exception), but his suit is a creditor's bill, brought by complainant for himself and others holding like obligations, and the moment said others appeared and proved their claims, the decree in favor of Warner was binding and conclusive on the defendant as to each of them. We think this principle was decided in Richmond vs. Irons, 121 U. S. p. 27, where most of the authorities cited by defendant to establish the contrary, were examined, and where the Court, at p. 54, used the following language in holding the prescription there pleaded as to intervening complainants had no force as to said intervenors the moment they appeared and established their claims:

> "Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stockholder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a complainant. It follows, therefore, that the statute sought to be applied in the present case ceased to run as against the complainants from the date the bill was filed, in October, 1876, under which they subsequently established their right to come in as participants in the benefits of the decree."

And in Hammond vs. Hammond, 2 Bland, of (Md.), 362, the Court said:

> "The principle upon which an injunction rests in such cases in that, substantially, a bill by a creditor in behalf of himself and all others, or a suit by any one, in which all the creditors may be represented, and allowed to come in to obtain satisfaction, is considered as making all of them parties to it, and that the decree is in the nature of a judgment for them all."

See also Brooks vs. Gibbons, 4, page 374; and Thompson vs. Brown, 4 Johns, Ch. 619.

It is, therefore, not true that the benefits of said decree extend only to the first $153,750 of drainage warrants issued, but to the full amount issued under said notarial act.

And that the city had the most ample authority to enter into said notarial act and issue all the warrants therein provided for and delivered, we will show hereafter.

II.

As to the propriety of disregarding said decree of the Circuit Court of Appeals, affirmed by the Supreme Court, with a direction that it be complied with, and entertaining defenses for the first time urged in the Appellate Court on this last review.

It may be that a Court of Chancery, under certain circumstances, will not lend its aid to enforce a decree where there are elements of "injustice, mistake, surprise, apprehension, or want of consideration" discovered, but who beside the most learned counsel in this case will dare to say that this can be said of the decree herein, rendered by the United States Circuit Court of Appeals after full argument and due consideration, and again after full argument, and consideration from March 13, 1899, to January, 1900, affirmed in all respects by the Supreme Court of the United States and remanded to the lower Court with a direction that it be complied with? Who beside the learned counsel herein will say that a decree thus rendered, thus affirmed, and thus ordered to be complied with, has in it, or can have in it, an element of injustice, mistake, surprise, apprehension or want of consideration? It may be that a court of equity will sometimes refuse to lend its aid to the execution of a decree of a lower Court never reviewed on appeal, or a decree entered by consent and without consideration by the Court, but here it is the decree of the highest Court in the land, sitting in equity, that is sought to be assailed, and why?

Not because of any act of complainant or any of the intervenors, not because petitioner has not had a full and fair trial, from the lowest to the highest Court of review, not because of any

newly discovered evidence, not because of any alleged suppression of evidence, or of any alleged fraud committed on the part of complainant or intervenors, but because, and only after a decision has been rendered in the Circuit Court in pursuance of said decree and appealed to and decided in the Circuit Court of Appeals, the defendant fancies it might have made the defense of want of authority in law to issue warrants in settlement of the claim for damages and in compromise of drainage collections diverted, and the defense of want of appraisement of said claims.

The proof, and every part of it, on which this supposed defense is based, was not only not suppressed, but on the contrary was on the filing of the bill herein furnished by complainant, because it is contained in an exhibit filed with the bill and made part of it. (R. pp. 10 and 43.)

If this is a good defense, should it not have been made when the case was heard on demurrer? Should it not have been availed of in defendant's answer where it admits its execution, and in its argument, oral and printed? And especially should it not have been put forth when said claim for damages and misappropriation, as well as the value of the franchise, were discussed, orally and by brief argued before this Court (because the brief of defendant, from which we print extracts in the appendix hereto, shows these very points were discussed, while the opinion herein shows they were considered by the Court)?

If this defense is good now it was good then, and this being so shall the case be opened for a further and new defense because the defendant has forgotten something, or because it wants to try something which it did not think worth anything?

But this is not all. This defense of want of authority to issue said warrants in settlement of the claim for damages and that of collections diverted and the defense of want of appraisement of said claims, as well as the want of appraisement of the franchise, was not made in the answer—was not even made before the master after the case was sent to him, by exceptions filed with him or otherwise; was not made before the Circuit Court by any ex-

ceptions there filed to said master's report, has not been tried or passed upon by the Circuit Court, but is, for the first time, sought to be injected into this litigation after the case has been heard and decided by the Circuit Court, and only after an appeal was taken to the United States Circuit Court of Appeals. This will clearly appear by reference to defendant's answer, to the exceptions filed before the master, and to those filed in the Circuit Court, and comparing them with the assignment of error on which the appeal to said Circuit Court of Appeals is based. See R. p. 150, also appendix to this brief, p. 42, where said exceptions and assignment of error are printed in full. This cannot be done. Even the Circuit Court should disregard any matters, on a consideration of a master's report, not raised by exception filed with said master.

In Story vs. Livingstone, 13 Pet. 359, at page 386, the Court said:

> "Strictly, in chancery practice, though it is different in some of the States, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and give him an opportunity to correct his errors or reconsider his opinion. Dick, 103. A party neglecting to bring in objections cannot afterwards except to the report (Harr. Ch. 474), unless the Court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objections to it."

In McMicken vs. Perin, 18 How., at page 510, the Court said:

> "In Story vs. Livingstone, 13 Peters, 539, the Court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time and give an opportunity to correct his errors and reconsider his opinion. * * * This Court will not review a master's report upon objections taken here for the first time."

In Topliff vs. Topliff, 145 U. S. p. 156, the Court reviews the above authorities, and at page 172 said:

> "It is sufficient to say in reply to this that no such exception was taken in the Court below to the master's report,

the only exception being that, in view of the Stringfellow & Searles patent, the master should have reported only nominal damages. It was held in Story vs. Livingstone, 13 Peters, 359, 366, that proper practice requires that no exceptions to a master's report be made which were not taken before the master, the object being to save time and give him an opportunity to correct his errors or reconsider his opinion. A party neglecting to bring in objections cannot afterwards except to the report, unless the Court, upon motion, see reason to be dissatisfied with the report and refer it to the master to review, with liberty to the party to take objection to it. And in McMicken vs. Perin, 18 How. 507, it was held directly that this Court will not review a master's report upon objections taken here for the first time. In affirmance of this principle, Rule 21 (sub. 2) requires that, 'when the error alleged is to a ruling upon a report of a master, the specification shall state the exception to the report and the action of the Court upon it.' This presupposes that the particular exception relied upon was taken in the Court below, and was passed upon by the Court adversely to the appellant. Proper practice requires that objections to a master's report shall be taken in that Court, that any errors discovered therein may be rectified by the Court itself, or by reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this Court. It would be manifestly unjust if this Court, after having affirmed the action of the Court below in every particular"—

(the very thing which it has done in this case)—

"should take up an error in a master's report which was not called to its attention, and reverse the case upon that ground, where, if exception had been duly taken, the error could have been at once corrected. There is nothing in this case to indicate that this point was ever made before the master, nor is it noticed in the eight exceptions taken to the report, which was set aside upon other grounds, or as, already observed, in the exception to his first report."

And questions not raised and passed upon in the lower Court cannot be assigned as error in the Supreme Court.

In Bell vs. Bruen, 1 How. p. 169, the Court, in passing upon a like matter, said:

> "The record shows this ground of defense was not brought to the consideration of the Circuit Court; we do not, therefore, consider ourselves at liberty to express an opinion upon the questions."

In Marine Bank vs. Fulton Bank, 2 Wall. 252, at page 258, the Court said:

> "The counsel for plaintiff in error raises the point, that the action was trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defense to such a count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point in the Court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. All the testimony was received without objection. No instruction was asked of the Court by either party as to the effect of the testimony in sustaining plaintiff's case, or as to the effect of the notice in making good defendant's receipt of depreciated paper. * * * It is too late now to object for the first time to the particular form of action."

In Klein vs. Russel, 19 Wall. p. 438, the Court, at page 463, said:

> "It is insisted, in this connection, that the reissue is void, because it was not for the same invention as the original patent. This point does not appear to have been taken in the Court below, and, therefore, cannot be made here."

In Badger vs. Ranlett, 106 U. S. p. 255, the Court, at page 259 and 260, said:

> "The plaintiff in error cannot raise the question as to the duty of one cent and one-fourth per pound, because it does not appear that he raised it on the trial."

In Coffey vs. U. S., 116 U. S. p. 436, the Court, at page 441, said:

> "In regard to the 1st, 3rd and 4th assignments, the questions presented by them were not formally raised in the Circuit Court, and are not presented by a bill of exceptions and cannot be considered here."

26198

Even where the jurisdiction of the Supreme Court is sought under the 5th section of the Act of March 3, 1891, it must appear that the constitutionality of a law of the United States was drawn in question and directly passed upon in the lower Court before the Supreme Court can entertain the case, and that this question cannot for the first time be raised in the latter Court by an assignment of error to the decision of the lower Court.

In Ansboro vs. U. S., 159 U. S. p. 695, at page 697, the Court said:

> "But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on admission or exclusion of evidence, nor to instructions given or refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject in the assignment of errors, filed February 13, 1895.
>
> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly that our jurisdiction can be invoked for that reason. *Borgemeyer vs. Idler,* 159 U. S. 408; *Carey vs. Railway Company,* 150 U. S. 170; *In re Lennon,* 150 U. S. 395; *Northern Pacific Railroad Company vs. Amato,* 144 U. S. 465, 472; *Sayward vs. Denny,* 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a case which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the fifth section of the Act of March 3, 1891."

In Cornell vs. Green, 163 U. S. p. 75, the suit was commenced by a bill in equity, and at page 79 the Court said:

> "The Constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the opinion or decree of the Court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, 'that said finding deprived said complainant of his property without due process of law.'"
>
> "The case is governed in every respect by recent decisions construing the same clause of the Act of Congress."

The Court then concludes its opinion by quoting from the foregoing case of Ansborough vs. U. S., and again says:

> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the fifth section of the Act of March 3, 1891."

III.

But on the supposition that we are all wrong in the foregoing, that nothing has been decided on the merits of this case, notwithstanding the long and earnest litigation herein during which it has passed three times through the Circuit Court, three times through the United States Circuit Court of Appeals, and been twice passed upon by the Supreme Court of the United States; and on the further supposition that after this earnest and protracted litigation it has been discovered that the decrees heretofore rendered herein ought now to be inquired into, and that exceptions never taken before the master, never filed to said master's report after it was filed in the clerk's office of the Circuit Court, and never heard or passed upon by said Court, and never raised until the case is heard in the Appellate Court, can be there

raised for the first time and decided, we will undertake the discussion of the merits of the case as raised by the various admissions and contentions of defendant, just as if the matters raised thereby had never been heard or passed upon by the Courts.

The contention now is as follows: That the benefits of the decree herein rendered does not extend beyond the first $153,750 of warrants issued, which it is contended were purchase warrants, and no farther, and that the balance of said warrants, whether issued to pay for purchase of the franchise, or in "settlement" of the claim for damages, or in "settlement" of drainage assessments collected and diverted from the drainage fund, were illegally issued and are void because not authorized by the statute of 1876, and because issued without appraisement beyond said $153,750. This alleged want of authority and want of appraisement is for the first time raised after the case was on appeal, and will be discussed hereafter.

The above is a clear admission (if admissions in the pleadings of this defendant are binding on her) of the liability of said city to the amount stated, and of the correctness of the decree herein for said amount, but on the theory on which it is contended that the liability as to be confined to the first $153,750 of warrants issued is untenable.

In the first place, counting from the first warrant issued under said notarial act, no such sum can be found. The first on the list are ten warrants for $10,000 each, making $100,000. These are followed on said list by 20 warrants of $5000 each, making $100,000, and next on said list follows 60 warrants of $2000 each, making $120,000, of which, two warrants of two thousand dollars each have been paid by the city. It will thus be seen that the sum of $153,750 cannot be figured out of the warrants issued —certainly not, unless by splitting some of them up, which neither the notarial act under which they were issued—whether an act of sale, or purchase, or settlement, or compromise, will permit.

Again. If the decree in favor of Warner for $6000, payable out of drainage assessments, based upon warrants by him pro-

duced, is of any value as determiningg anything in this case (and the brief presented by defendant's counsel on petition for *certiorari* admits it is, and the exception to the master's report filed in the clerk's office by its terms only relates to intervenors, and contained no prayer for any relief whatever), then, on the theory of the defense, that all warrants issued are to be considered as applied in their numerical order, it was definitely decided by the Circuit Court of Appeals and affirmed by the Supreme Court that the warrants issued in payment of the purchase of the franchise, or in "settlement" of the claim for damages, are legal and entitled to be paid, for Warner's warrants do not fall among the first $153,750 issued, but come after the first $272,000 issued, as appears by defendant's statement of warrants issued under said notarial act (R. p. 137 to 139), being Nos. 379, 380 and 381, and the defendant's liability on these warrants is the very first thing decided in the foregoing decree.

Again. The judgment at law of Wilder & Company, intervenors, rendered on May 24, 1898, (R. p. 155 to 158,) after the case had been remanded from the Circuit Court of Appeals, from which no subsequent review was asked or allowed, establishes the same thing, for as appears from the petition in the suit (R. p. 155), said judgment was based—

> "on two certain warrants, dated June 6, 1876, one for $2000 and one for $5000, issued by the City of New Orleans * * to Warner Van Norden * * and by him endorsed, which are on file herein and made part hereof, being part of a lot of $320,000, delivered for the purchase of certain property described in an act of sale passed before G. LeGradeur, Jr., Notary Public, dated June 7, 1876, filed herewith and made part hereof, all issued and delivered pursuant to an Act of the Legislature, approved March 24, 1876, being No. 16 of that year, and payable out of drainage tax assessments, created under and pursuant to the following Acts of the Legislature of Louisiana, to-wit: Act No. 165, approved March 18, 1858; No. 191, approved March 17, 1859; No. 57, approved March 1, 1861, and Act No. 30 of the year 1871."

See also said judgment, R. p. 158.

Surely there can be no doubt that the warrants on which this judgment is based were part of the $320,000 issued under said notarial act. It is true their numbers do not appear by said petition, but what said numbers were is conclusively shown, for the petition is only a part of the exhibit in the proof of said Wilder & Company filed before the master, as appears on page 112, where said warrants, the foregoing petition, as well as the answer and the judgment based thereon were offered in evidence, and from which it appears said $5000 warrant is No. 341, and said $2000 is No. 402.

On page 137 and following of said record is a "statement of purchase warrants, or warrants issued June 6, 1876, under act of sale of June 7, 1876, by * * Canal Company and W. Van Norden to the City of New Orleans before Gustave Legardeur, Notary Public," from which it appears that said warrant No. 341 falls far below said first $153,750 issued, and in fact when added to those going before it makes $195,000 of warrants issued.

Surely, it has again, on the very theory of the defendant, been conclusively decided that the warrants issued in "settlement of the claim for damages, or for the purchase of the franchise," are legal and valid by a final judgment based thereon in a suit against the defendant herein.

Nor is this all. On the same theory of the defendant, and in fact on the direct proof (for it appears that warrants Nos. 393 to 402, inclusive, aggregating $20,000 (R. p. 131) were "issued in compromise of judgment against the City of New Orleans for drainage taxes due on the New Orleans Park"), it has also been decided that said $20,000 of compromise warrants were legal, as evidenced by the same judgment in favor of Wilder & Company, for the second of the warrants on which they recovered, was the very last of the $20,000 issued under the bill of sale in satisfaction of the said drainage tax on said Park and wrongfully applied to general fund purposes.

The situation, then, as to the entire issue of the $320,000 under said notarial act, on the admissions of the defendant, and on the admitted decisions on warrants, is simply this. The liability of the city on $153,750 of what defendant calls strictly purchase warrants, is by it admitted. The liability of the city on the balance of the issue of the $300,000 issued under said notarial act for the purposes therein stated, whether to settle claims for damages or for the purchase of the franchise, on the contention of the defendant, is established by the solemn judgment in favor of Warner on warrants No. 379, 380 and 381, and the city's liability on like warrants is again established by the solemn judgment in favor of Wilder & Co. on said warrant No. 341, and the liability of said city is likewise established on said $20,000 of what are called compromise warrants by said solemn judgment of Wilder & Co. on said warrant No. 402. And here it is proper to remark, that defendant has again admitted its liability on said issue of $20,000 of warrants by paying two of them for $2000 each, to-wit: Nos. 400, 401 (R. p. 139).

And whether the purchase of the franchise was a matter of value to the city or not is of no concern in the present inquiry (and we will hereafter show it was), for the notarial act under which the purchase and settlement was made and all the warrants thereunder issued and delivered are executed contracts, which have never been set aside for error, fraud, or mistake in their execution. But in addition to this, the contention that it had no value, but on the contrary imposed the burden of doing drainage work, for the payment of which no means were provided, has several answers.

In the first place, it has always been contended there was no obligation imposed on the city to continue the work of drainage, and this as late as the answer filed in this case. (R. p. 26.)

And the city has always contended the drainage contract was a most onerous contract, that the price paid was entirely too high, and that it ought to be terminated. She contends this in part at the very outset in Ordinance No. 814 (No. 172, October term, 1899, R. p. 244), when undertaking the performance of the

duties imposed on her by Act No. 30 of 1871, she complained of being denied the right to fix the price to be paid for the work to be done under said contract.

And to prove that it was onerous and the prices exorbitant, the defendant called several witnesses. Brown (R. No. 172, October term, 1899, on page 446) testified the price of 50 cents per cubic yard for digging canals and 50 cents per cubic yard for building levees was twice as much as it ought to have been, and Major Harrod testified to the same thing at page 466 of same record, while, as we will show hereafter, it was of great value to the Canal and Van Norden. And as to the settlement of the claim for damages, the proof shows this claim had long prior to the execution of said notarial act been asserted by the Canal Company and Van Norden, for the ordinance of the Council No. 3479 (R. p. 42) calls upon said Hardee to state what the records of the office of the city surveyor show on this subject; certainly for the purpose of showing what would be a reasonable sum to be paid in settlement thereof. This, of course, was the city's side of the claim, but not the side of Van Norden and the Canal Company, who did not herein offer, and were not called upon to offer, proof on this subject, and simply because the matter had crystallized into a settlement, which has never been attacked or set aside for error, fraud, or mistake. This claim, said notarial act in direct terms declared was settled by the issue and delivery of said $300,000, and in addition thereto all claims that they might ever hereafter have.

Next, as to the settlement of the claim for drainage money collected by the city and misapplied. The fact of this collection and misapplication is too clear to admit of discussion. It is not denied by defendant. The evidence (settlement in the suit of the Commissioners of the New Orleans Park (R. No. 172, October term, 1899, pp. 230 to 242, and especially page 238, in connection with page 317) shows it. The notarial act admits it, for it provides for the issue of warrants, and the city actually did issue them in satisfaction thereof.

The only contention now is that there was no authority given by the Legislature to make such settlement, but this matter will be discussed later.

And here it is to be observed that there can be no doubt of the right of the holders of drainage warrants to have drainage taxes collected applied to the payment of these warrants, nor can there be any doubt of their right of action for a violation of this right. This right and right of action would flow from the very relation existing between the parties, but in this case these rights are doubly clear, for the duty of the city in the premises was specially provided for in the ninth section of Act 30 of 1871, as follows:

> "Be it further enacted, etc., * * That all money or moneys received by said Board of Administrators from said commissioners of the drainage districts, either from the sale of property received from said commissioners, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this this section of this Act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and be held as a fund to be applied *only* to the drainage of New Orleans and Carrollton, in accordance with the provisions of this Act."

IV.

And the authority of the city to enter into said notarial act and issue and deliver all the drainage warrants therein mentioned, whether for the purchase of the dredgeboats, implements and machinery, or the franchise, or in settlement of the claims for damages or moneys collected and diverted, was most ample.

The Act of the Legislature of February 24, 1876, pursuant to which said notarial act was executed and all of said warrants issued and delivered, authorized the city to do two things, to-wit:

> "*To transact and contract* * * for the *purchase and settlement* of all or any rights, franchises and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of Act No. 30 of Acts of

1871; *also,* for the purchase and transfer to the City of New Orleans of all tools, implements, machines, boats and apparatus used for or pertaining to drainage work authorized to be done by said Act No. 30."

As to the former, the city was authorized "to transact and contract" * * "for the purchase and settlement" thereof, while as to the latter it was authorized "to transact and contract" * * "for the purchase and transfer" thereof.

"Purchase" of what rights, franchises and privileges arising in favor of said company or its assignee? Clearly the franchise and privilege to do drainage work on the terms stipulated in said Act 30 of 1871, as well as to purchase the physical property of the company in the shape of tools, implements, &c. And "to transact and contract" for the "settlement" of what? Clearly for the violation of all and any rights by said Act granted, among which was the right granted by the sixth section of said Act 30 of 1871, to claim damages, as follows:

> "That the Board of Administrators shall be required, and it is hereby made their duty, immediately after the passage of this Act, to locate the lines of the canals and protection levees specified in the various sections of this Act in time to prevent delay in the prosecution of the work of said company; * * and should the City Council fail to locate the lines of said canals and protection levees above specified, the City of New Orleans is hereby made liable for the damages resulting from such delay."

This claim for damages, the proof (Hardee's inventory and report (R. pp. 48 to 50) and Ordinance No. 3479 (R. p. 42) shows had long prior to the passage of said Act No. 16 of 1876, been asserted by said company and its transferee; and further shows, beyond all doubt, that said Act was passed to provide for a settlement thereof.

And not only "to transact and contract" for the "settlement" of said claim for damages, but also "to transact and contract" for the "settlement" of the violation of the right which said company and its transferee had, to have all drainage tax collec-

tions deposited to their credit and made available for the purposes of drainage, under the ninth section of said Act 30 of 1871, the latter part of which, as before stated, provided—

> "that all money or moneys received by the said Board of Administrators from said commissioners of the drainage districts, either from the sale of property received from said commissioners, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this Act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with provisions of this Act."

And as before stated, the proofs show this provision was violated (R. p. 41) and in "settlement" of this violation the proofs further show $20,000 of warrants in addition to the $300,000, were issued under said notarial act, in compromise of a judgment for drainage taxes on the New Orleans Park, for $24,000 (R. p. 136), if not for $26,725.90. See suit of Commissioners of the New Orleans Park vs. City of New Orleans (R. No. 172, October term of 1899, pp. 230 to 244), and depositions of Butler, p. 317, in connection with statement on p. 238. Also, see depositions of Fount, p. 315; Rabouin, p. 214, same record; all of which show that in the settlement of a judgment against the City of New Orleans, in the above suit, she was allowed to retain said last named sum, which she never deposited as required by the above Act, but retained the same as part of the general fund of said city.

And here it should be observed, that the words "to transact" as used in the above statute of 1876, under which said notarial act was made and said warrants were issued, under the jurisprudence of Louisiana, has a special significance, and means "to compromise," and read in this light means the City of New Orleans was authorized "to compromise and contract for the purchase and settlement of all and any of the rights, &c., of the Canal Company and its transferee, but of this more will be said hereafter, under the discussion of the matter of appraisement and

26203

whether the same was a condition precedent to the right to purchase, &c.

We think, therefore, that it is beyond dispute that the settlement of this claim for damages, and of this claim for drainage taxes misapplied, was authorized by said Act of 1876, and that said claims have been fully, fairly, conclusively, legally and in unmistakable terms settled by said notarial act, entered into under the authority of said legislative Act of 1876.

V.

As to the appraisement of the matters purchased and settled for, and as to whether such an appraisement was a condition precedent, or merely for the advice and assistance of the Council in making a compromise and purchase with the Canal Company and Van Norden, &c.

In the first place, it is to be observed there is no proof that a full and minute appraisement was not had of everything purchased and settled for, before the notarial act was signed.

It is true this record does not show any report or appraisement beyond that of Hardee of May 1, 1876, which fixed the value of the dredgeboats, machinery, &c., at $153,750, and reported the facts as to damages as they appeared on the records of the city surveyor's office, giving the number of cubic yards of work claimed by the Canal Company and Van Norden, they were prevented, by the city from performing and the number of cubic yards which he thought they were prevented from performing by said city, the price of which was fixed by the statute of 1871, which will be noticed hereafter.

But there is no proof that this was the only report or appraisement made, if any further appraisement was necessary, and if such further appraisement was necessary the presumptions are all in favor of the same having been made, and in any event such purchase and settlement must stand unless there is proof to the contrary, which the defendant has not offered or attempted to offer.

There certainly was ample time for such additional appraisement to have been made (if at all necessary to be made), before

the notarial act was entered into, because one month and six days intervened before the said act was signed—the report of Hardee in evidence being dated May, 1876, and the notarial act June 7, 1876.

But an appraisement of the matters and things authorized to be purchased and settled for, and actually purchased and settled was not a condition precedent to said purchase, but the provision in relation thereto was merely advisory, and not imperative, and the matters purchased and settled for were substantially appraised before said notarial act was executed.

Whatever was requisite and necessary to be done in this respect is to be determined by reference to the statute under which the authority to purchase and settle was granted.

As before stated, the statute authorized the city—

> "to transact and contract * * for the purchase and settlement of all or any rights, franchises, and privileges created, authorizing or arising * * under and by virtue of Act 30 of 1871; also, for the purchase and transfer to the City of New Orleans of all the tools, implements, machines, boats and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30."

And the next section of said Act further provided:

> "That should it be deemed advisable by said Council to make said purchase and settlement, it shall be the duty of said Council of the City of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance."

These provisions are purely directory and not imperative, and especially does this appear when we take the whole statute together and consider the object thereof, and the character of the things to be purchased and settled for.

And in construing said statute we are to remember it is one of the Legislature of the State of Louisiana, and that its meaning is to be sought in the jurisprudence of that State. The very first

thing granted is "to transact and contract," and this in Louisiana has a special and well-defined meaning, quite different from the ordinary meaning of the words "to transact," as will appear from Article No. 3071 of the Civil Code of Louisiana, which declares:

> "A transaction or compromise, is an agreement between two or more persons who, for the purpose of preventing or putting an end to a law suit, adjust their differences by mutual consent."

The full measure of the authority granted was, that the city was authorized, without any limitation or condition, to "compromise" and contract for and in reference to the property rights and claims mentioned, to purchase what was susceptible of sale, transfer and delivery, and to compromise and settle for what was inchoate, intangible and incapable of delivery.

This was the view taken by the Council of the City of New Orleans, for in its ordinance appointing its own city surveyor its appraiser, it instructed him:—

> "to make a thorough examination of the condition and value of all the dredgeboats, machinery, tools and appurtenances belonging to the * * Canal Company or its transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by said * * Canal Company, or the transferee thereof".

In short, he was to report the value and condition of the tangible property and all information in his office as to the claims for damages. And this ordinance and the powers and duties therein conferred were strictly within the statute, for by its terms, the duties and powers of the appraiser therein provided for were not coextensive with the general duties and powers of appraisers, but were such and only such as the Council might give them, for said statute in the most unequivocal terms provided:—

> "that the duties and powers of said appraisers shall be specifically assigned in said ordinance."

In other words they were to do just what the City Council requested them to do, and no more or less.

And when we consider the object of the statute, the alleged imperative necessity for an appraisement still further disappears. This was to get rid of the Canal Company and its transferee and the contract which the Legislature of the State had made with the former, and which had become the property of the latter. The justness and legality of this contract, from the very outset the city disputed, and notified said company that it expressly reserved the right to contest at law or otherwise the constitutionality thereof (R. No. 172, Oct. Term, 1899, pp. 244 to 247), while it ever contended the price paid for the work done was double what it should have been. (See same R., pp. 446 and 466).

To prevent this law suit as to the constitutionality of said drainage contract or franchise, to end the exorbitant price paid for the work done and to enable the city to assume the entire control of all matters of drainage (see preamble and section four of Act 16 of 1876), the city was authorized to compromise,—"to transact" with Van Norden and the Canal Company for the acquisition of their property, rights, contracts, franchises and claims of whatever nature and kind. This desired result by compromise, by giving and taking, by conceding on one side and the other, certainly could not be accomplished if one party to the desired compromise had no authority as to price except such as might be fixed absolutely by an appraisement.

And the character of the matters to be settled for also precludes the idea of an appraisement being a prerequisite condition, for who and what, but the verdict of a jury could fix the value of a claim for damages, or the value of the claim for moneys collected and misapplied, and especially when the wrongdoer was without credit, and when its acknowledged obligations were selling in the market for 26 1-2 cents on the dollar. (R. No. 172, Oct. Term of 1899, p. 395.)

We therefore think the appraisement was not a matter of necessity, but a means of assistance to enable the city intelligently to

26205

discuss the whole matter with the Canal Company and Van Norden, so as to accomplish the object to be attained, to get rid of said company and its transferee and their contract and their claims against her. There is nothing in the statute requiring that the said sum to be paid should only be the amount of the appraisement and not otherwise. In the absence of such requirement, the law applicable to this state of affairs is laid down thus in French vs. Edwards, 13 Wall. 506:—

> "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations prescribed to secure order, system and dispatch in proceedings, and by the disregard of which, the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that assigned."

See also *Enderlich on the Interpretation of Statutes,* Sec. 436, 437 and 433; also 21 Mass., p. 67.

Here the rights of no one was to be affected by said appraisement. The city certainly was not to be affected or concluded thereby, for she might reject any estimate said appraisers might make and refuse to "transact and contract" at all.

Surely in view of the foregoing it cannot be said that the action of the City Council in prescribing the specific duties and powers of its appraiser, just as she did on ordinance No. 3,479 (R. p. 42) was erroneous, that what said appraiser did in pursuance of the directions given him was illegal, nor that the notarial act of June 7th, 1876, and the warrants issued thereunder were not strictly valid and binding on the defendant.

And after all did not the city have a most substantial appraisement of this very claim for damages before she entered into said notarial act with Van Norden and the Canal Company pursuant to which all the warrants were issued? In the very same document in which the city's appraiser reports the value of the dredge-

boats, etc., at $153,750, he reviews said claim for damages (R. pp. 48 to 50), based on 363,000 yards of excavation, which through the fault of the city, the Canal Company and its transferee were prevented from performing, and after rejecting claims respectively on 80,000, 24,000 and 68,000 yards of excavation, reduced the remaining claim based on 190,000 yards of excavation to 149,445 yards of excavation, and at p. 49 said:—

> "These boats (Nos. 1, 4 and Clam Shell) finished the interior work they were engaged upon last November and were ready to proceed with the Lake shore revetment levee, but were prevented from so doing by the refusal of the city authorities to allow the city surveyor to furnish the necessary lines and levels."

The very things for which, as we have already seen under the 6th section of Act 30 of 1871, the defendant was to be responsible in damages.

Said appraiser on the same page further reported:—

> "The only boats therefore for which an assessment for damages can be entertained are No. 1, No. 2 and the Clam Shell, and I have deemed that the most equitable way to arrive at a conclusion is to make an abstract from the records of what these several boats earned in a certain period immediately anterior of being stopped, and accept this as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of their delay.

	Cu. Yds.
Boat No. 1, 5 1-2 months at 12,720 yds per month	69,960
Boat No. 4, 5 1-2 months at 12,350 yds per month	67,925
Boat Clam Shell, 4 months at 2890 yds per month	11,360
Making a total of	149,455

Under the second section of said Act No. 30 of 1871 said Canal Company was:—

> "authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of said canal and levee and of all canals dug and levees to be built by said company to be designated and fixed by the Board of Administrators," etc.

This is the identical levee referred to above by the city surveyor as "the Lake Shore revetment levee" where the city authorities had refused to furnish the necessary lines and levels for the construction thereof.

The compensation to be paid for the above 149,445 yards of excavation and for the protection levee to be formed with the earth excavated, as authorized by said second section, is fixed by the eighth section of the same Act at:

> "At the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for protection levee."

In other words the amount coming to the Canal Company and its transferee on the above basis was $149,445, which added to the above $153,750, makes $3,195 more than the $300,000 mentioned in said notarial act.

But this does not include the value of the exclusive contract or franchise for doing the balance of the work thereunder, which has been established by the city herself, for she has shown what the work remaining to be done could have been done for and hence the profits that would result therefrom, as follows:—

Major Harrod, at page 461 of Record No. 172, October Term, 1899, used under stipulation of counsel (see page 167 of the present Record), after stating his profession as civil engineer and his connection with the city of New Orleans as its chief engineer and that he was familiar with the work constructed and to be constructed by the Canal Company and Van Norden under said Act No. 30 of 1871, was asked what it would have cost to complete the protection levees and adjacent canals contemplated by said Act, gave the various items, which aggregate, according to the rate of compensation fixed in said Act No. 30 of 1871, $2,232,800.

This witness says these figures were exceedingly high, and on cross-examination at pages 468 and 469 (same record) states the work could have been done at one-half of this sum. And at page 446 and 467 of the same record, this witness is sustained by another city witness, H. C. Brown, assistant city engineer, as to the

price of the work allowed by said Act of the Legislature, and that it was twice as high as it should have been—that a fair price would have been 25 cents per cubic yard instead of 50 cents per cubic yard.

From the foregoing it appears that the value of the exclusive contract or privilege for the completion of the unfinished part of the work was to Van Norden and the Canal Company, on the evidence of the city herself, $1,116,400.

Surely this sum added to the amount reported by Hardee to the committee of the whole as the value of the boats, machinery, etc., to the amount of excavations which the city prevented the Canal Company and Van Norden from performing, shows that the $300,000 paid in drainage warrants for the boats, machinery, contract and damages—estimating the profits on the above basis—was not 25 *per cent.* of the value of the matters and things purchased and settled for, and that there can be no doubt that said purchase and settlement was most reasonable and advantageous to the defendant.

VI.

We think it is therefore very clear that in all things the master has complied with the instructions contained in the decree of said Circuit Court of Appeals, affirmed in all respects by the Supreme Court, and by the latter remitted to the Circuit Court to be carried into effect, and that in affirming said master's report and rendering judgment in favor of complainant and the holders of other warrants issued under the same notarial act, the Circuit Court has done only just what it was directed to do and that there is no possible error in its decree, nor in the decree of the Circuit Court of Appeals affirming the decree of the said Circuit Court, and that there never has been the slightest excuse for the present proceedings and the consequent delay and expense, and this being the case we think it is high time this trifling, dishonest defendant should be taught a useful lesson in this most frivolous appeal, and hence we ask that Rule 23, Div. 5, of this Honorable Court be

price of the work allowed by said Act of the Legislature, and that it was twice as high as it should have been—that a fair price would have been 25 cents per cubic yard instead of 50 cents per cubic yard.

From the foregoing it appears that the value of the exclusive contract or privilege for the completion of the unfinished part of the work was to Van Norden and the Canal Company, on the evidence of the city herself, $1,116,400.

Surely this sum added to the amount reported by Hardee to the committee of the whole as the value of the boats, machinery, etc., to the amount of excavations which the city prevented the Canal Company and Van Norden from performing, shows that the $300,000 paid in drainage warrants for the boats, machinery, contract and damages—estimating the profits on the above basis—was not 25 *per cent.* of the value of the matters and things purchased and settled for, and that there can be no doubt that said purchase and settlement was most reasonable and advantageous to the defendant.

VI.

The very fact that defendant has not in his answer, nor in his oral or printed arguments, nor in the proceedings before the master, nor in his exceptions to the master's report filed in the clerk's office of the Circuit Court, nor in his argument before said Circuit Court, and never until the case was appealed, made the defense of the want of appraisement beyond $153,750, and want of authority to settle the claim for damages and drainage moneys misapplied, is proof positive that it believed and knew that said notarial act of June 7, 1876, was not only an act of purchase of the tangible property therein described, but also "a transaction," a compromise and settlement of the claims for damages and moneys misappropriated, and that no appraisement of the latter was a condition precedent to the settlement thereof, and that the present late contentions are but like the efforts of a drowning person catching at straws.

enforced and defendant condemned to pay in addition to costs, ten per cent. damages, for we believe this litigation was completely finished when the decree was entered affirming the masters and rendering judgment in favor of the complainant and intervenors on like obligations, which it is not contended have ever been paid in whole or in part, was rendered.

We are aware that the right of appeal and review is a most sacred right and rarely ever ought to be discouraged, but in this litigation, where the case has been litigated until it is more than threadbare, where the defendant has been heard again and again, and when now, without any new pleadings or proofs, his only prayer is that the Court will refuse to recognize what it has so often and after the most thorough argument and consideration decided, who will say that this review has the slightest pretense of merit, and that the only possible motive therefor, was not to harrass and delay complainant and intervenors?

It is true the case is not technically before this Court on appeal or writ of error, but under the statute pursuant to which the right to review by *certiorari* is granted, the case after its removal under said writ is to be treated in this Honorable Court just the same as if it had come here by appeal or writ of error.

In Hubbard vs. Todd, 171 U. S., at page 494, the Court said:

> "It is provided in the Judiciary Act of March 3, 1891, Sec. 6, 26 Stat. 826, 828, that any case in which the judgments or decrees of the Circuit Court of Appeals are made final, may be required by *certiorari* or otherwise to be certified to this court, for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

It is but an appeal granted by the Supreme Court, instead of the lower court.

It is also true that none of the parties before the Court besides Warner were parties to the litigation at the time said decree of said Circuit Court affirmed as aforesaid, was made, but as to Warner, and as to Wilder & Company there are absolute decrees in their favor establishing the amount of the debts due them and

the source from which they are to be paid—that in favor of Wilder & Co. as early as May, 1898 (R. p. 81). Their claims are *res adjudicata;* and as to these, the appeal to the Circuit Court of Appeals, and the application to this Court not being based on the only possible open fact, to-wit, whether the assessments from which said judgments were payable was sufficient to pay all warrant holders in full—which finding by the master is not put in issue by any objection or exception made before said master, nor before the Circuit Court, nor in any assignment of error here made—what, we repeat, can be the motive for this appeal but to harrass, annoy and delay complainant and intervenors in the realization of the moneys so often decided to be due by this defendant. Clearly damages ought to be awarded them as compensation for the expense and annoyance on this most unfounded review.

And like damages should be allowed the other parties in addition to Warner and Wilder & Company, because, as we have seen under Richmond vs. Irons, 121 U. S., page 54, and Hammond vs. Hammond, 2 Bland (Md.), p. 362 and cases cited, above referred to, when intervenors, holding like obligations appeared and proved their claims, they from that moment became complainants with the same rights and to the same effect as if their names had been originally incorporated in the bill of complaint.

Surely the decree appealed from should be affirmed with costs and ten per cent. damages.

Respectfully submitted,

RICHARD DEGRAY,

Solicitor for Complainant and Intervening Complainants and Respondents.

2620

APPENDIX TO BRIEF.

EXCEPTIONS FILED BEFORE THE MASTER (R. p. 108), AND REFERRED TO IN THE FOREGOING BRIEF.

"*First*—That there is error in charging the defendant with liability for the whole of the uncollected assessments against private property owned by private persons, because the evidence shows that all such taxes as could be or were susceptible of collection have been collected and paid over to the parties and persons for whom they were assessed.

"*Second*—The advantages of the decree herein, under which this reference is made, extend to such warrants as were used in payment of the property purchased by the act before G. Legardeur, notary public, of date June 7th, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750 and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of warrants were issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company, and Warner Van Norden, against the city of New Orleans; that of said warrants the sum of $20,000 were issued, as will appear by the express terms of the said act, in payment of work which had been done by the Van Norden, that is, digging canals and building levees, which, at the time of the passage of the said act, had not been surveyed or measured by the city surveyor, and hence, that as to these warrants there could be no recovery or allowance; that in any event, the decree in the suit of J. W. Peake vs. City of New Orleans, No. 11,614 of the United States Circuit Court for the Eastern District of Louisiana, is *res judicata* in favor of this defendant.

"That although there is no mark or sign upon any of said warrants, which were issued in payment of the price of the property purchased, and which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work which had been done, the said warrants can be so identified and distinguished, at

least so as to ascertain what amounts were issued in payments of the price of property, and which were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for damages, and lastly to the payment for work mentioned in said notarial act; that all of said warrants bear date June 6th, 1876, the first one bearing the number 313, and ran up to and inclusive of number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

"That from an examination of said warrants, and a comparison of their numbers, it will be seen, that the issuance of warrant No. 332 there had been reached an issue of $150,000, adding to which, warrant No. 333, for $5,000, would make a total issue of $155,000, of a difference of $1,250 in excess of the amount intended and authorized to be issued for payment of the price of said property.

"Payment of all warrants subsequent to warrant No. 333 should be refused."

EXCEPTIONS TO MASTER'S REPORT FILED IN CLERK'S OFFICE, CORRECTED BY AGREEMENT, AND REFERRED TO IN THE FOREGOING BRIEF (R. p. 143).

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER

vs.

THE CITY OF NEW ORLEANS.

No. 12,350.

"Exceptions taken by defendant to the report herein made by the Hon. A. G. Brice, Special Master herein, on the claims of intervenors, save and excepting that of James Jackson:

"*First*—That there is error in charging defendant with liability for the whole of the uncollected assessments against private property, or property owned by private persons, because the evidence before the master shows that all such

taxes as could be or were susceptible of collection have been collected and paid to the parties and purposes for which they were assessed.

"*Second*—That the advantages and the decree herein, under which this reference in made extend only to such warrants as were issued in payment of property purchased by the act before G. Legardeur, notary public, of date June 7, 1876, which property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounting to $153,750 and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden, against the City of New Orleans; that of said warrants, beside those issued in settlement of said claim for damages, the sum of $20,000 were issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the City of New Orleans prior to June 6, 1876, and applied to general fund purposes, and hence as to these warrants, in any event, there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake vs. City of New Orleans, No. 11,614 of the United States Circuit Court for the Eastern District of Louisiana, as *res adjudicata* in favor of this defendant.

"That although there is no mark or sign upon any of said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delivered in payment of drainage work which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of said property, and which were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for

damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing 313 and ran up to and inclusive of the number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

"That from an examination of the said warrants, and a comparison of their numbers, it will be seen, that with the issuance of warrant No. 332 there had been an issue of $150,000, adding to which warrant 333 for $5,000, would make a total issue of $155,000, or a difference of $1,250 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

(Signed) "BRANCH K. MILLER,
"Solicitor for Defendant."

ASSIGNMENT OF ERROR REFERRED TO IN THE FOREGOING BRIEF, FILED ON TAKING APPEAL TO UNITED STATES CIRCUIT COURT OF APPEALS.

"*First*—That the Court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, Special Master, filed in this Court on the ——— day of March, 1900; that the Court should have maintained such exceptions to the report, and have entered a decree in favor of respondent.

"*Second*—That from the evidence before the Court, accompanying the said report, it conclusively appeared that the dredgeboats, derricks, etc., and the other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Norden and the Mexican Gulf Ship Canal Company, by authentic act before G. Legardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750, *under the appraisement made pursuant to the Act of the General Assembly of Louisiana No.* 16 *of* 1876, and that to this extent only, and no farther or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of

the purchase price of property, and hence, not entitled to the benefits of the decree in this case.

"*Third*—That as to the $20,000 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the City of New Orleans to other drainage purposes, there was no warrant or authority in law, or otherwise, for their issuance; that they were in no sense purchase warrants or warrants issued in payment of the price of any thing, in the sense of the findings of this Court, or of the Supreme Court of the United States, in this cause; that the Circuit Court erred in admitting them to any participation in the fund ascertained by the master to be due by the City of New Orleans, to their payment out of the same.

"*Fourth*—That as to the remainder of the said $320,000 issued as shown by the said act of sale from Van Norden and said Company to the City of New Orleans, that is, the residue, after deducting the said $153,750, the value of the dredgeboats, etc., and $20,000, in satisfaction of drainage taxes claimed to have been diverted, to-wit: $146,250, they were issued without any warrant or authority of law, the said Act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans and were a mere gratuity; that as far as the said residue of said warrants may have been, or pretended to have been issued in settlement of any claim for damages due by respondent to Warner Van Norden or the said company, it was without warrant or authority of law, the said Act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; *and that even were it otherwise, there was no appraisement of said damages, which in any event would be a condition precedent under said Act of* 1876, *for any settlement or adjustment thereof;* that so far as said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of the said franchises by respondent was not an acquisition of property, or any thing of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees and to charge therefor at the rate

of fifty cents per square yard for each class of work, while the assumption of this work by the City of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charges therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, *except at a price fixed by an appraisement, under the Act of* 1876, *prior to its purchase, and no such appraisement was made.* That the Court should have refused the allowance of said residue of warrants against the fund ascertained to be due by respondent and should have rejected any claim against the same evidenced by warrants in excess of the said $153,750, while as a matter of fact the whole amount of the said $320,000 of warrants issued by the city were decreed to be payable out of the said funds, save $4,000 thereof, which has been paid, in which finding the Court was in error.

"*Fifth*—That warrants to the extent only of $153,750 should have been admitted as due by the city out of said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the Act of 1876, and afterwards to have done what there was no right to do.

"*Sixth*—That the Court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the Court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750, ascertained as aforesaid.

"*Seventh*—That the Court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decree in this cause, made and entered by this Court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issue raised by the latter had never been considered by this Court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either Court; that the Circuit Court erred in so holding, and should have held the reverse.

26211

"Wherefore respondent prays, that the said decree be reversed, and that the said Court may be directed to enter a decree in accordance with the prayer of the defendant on the exceptions to the report of said master."

EXTRACT FROM BRIEF OF DEFENDANT (PP. 3 AND 4), ON THE QUESTION OF THE SALE OF THE FRANCHISES AND THE SETTLEMENT OF THE CLAIMS FOR DAMAGES, AND FOR THE MISAPPLICATION OF DRAINAGE MONEYS COLLECTED, AS FILED AND USED IN THE ARGUMENT OF DEFENDANT, IN WARNER VS. NEW ORLEANS, NO. 172, OCTOBER TERM OF 1899, 175 U. S. 120; ALSO EXTRACT FROM OPINION OF SUPREME COURT ON SAID MATTER.

The defendant, after contending that the price paid by it ($300,000) was too high, because Van Norden, more than three years prior to said sale had bought the same property for $50,000, said in said brief:—

"It may be replied that by the city's act of purchase she acquired not only the derdgeboats and like property, but also the rights, privileges, and franchises of the Canal Company, conferred by Act No. 30 of 1871.

"But a reference to the statute will show, that the franchises and privileges of the Canal Company were to dig canals and build levees, for the prices allowed by the Act; the purchase of these franchises by the city, was less an acquisition, than it was the assumption of an obligation to do drainage work, and collect the cost thereof from the property liable to assessment under the statute; all for the benefit of Van Norden. It appears by the appraisement (R. p. 95), that the value of the derdgeboats and other tangible property was fixed by the city's appraiser, at one hundred and fifty-three thousand seven hundred and fifty dollars ($153,750); the appraisement contained a reference to the damages claimed by the Canal Company for delays, upon which, however, no value was placed. It would be interesting to know the basis of the difference between $153,750, the value of the dredgeboats and other property, and the $300,000 which was eventually paid by the city as the price. The claim for damages in no respect entered into this sum, as it is not men-

tioned at all in the act of sale" (not true, see R. p. 100, where it is stipulated said $300,000 also in full settlement of all claims the Canal Company and Van Norden then had, or ever had, or might thereafter have) "which is a conveyance only, of the franchises of the company and of the tangible property mentioned. The first section of the Act of 1876 authorized the city to make the purchase and settlement of the Canal Company of any and all rights, franchises or privileges, arising out of the Act of 1871, also the purchase of all tools, implements, machines, boats and apparatus, belonging to the company or its transferee, used for work authorized by the Act of 1871; the second section of the Act directs an appraisement to be made of the rights and things to be purchased and settled for, if the Council should deem it advisable to make the purchase. It is seen that the appraisement of the property reached an infinitessimal amount in excess of about one-half of the amount paid, and that the franchises of the company, which, it may be remarked, had already been sold by the company to Van Norden on November 22, 1872, were not appraised at all.

"A possible explanation of this may be found in the assumption that they were considered of no value, or susceptable of appraisement at all; the mention in the act of purchase of the payment of twenty thousand dollars ($20,000), in settlement of an amount claimed to have been diverted by the city, furnishes no aid to complainant in this view of his case, as this was in addition to the $300,000 paid for the property and franchises."

And a few extracts from the opinion of the Court in said case will show how the above were considered by the Court, which at page 175 said:—

"Acting under the authority of this Act of February 24, 1876, the city accepted the option, appointed an appraiser of the property of the Ship Canal Company, and authorized the Mayor to purchase of said company, or its transferee, *all its property, and to stipulate for a full settlement of all its claims for damages.* Thereupon the Mayor entered into a contract with the Canal Company and with Van Norden, its transferee, *for the purchase of their property and the relinquishment of all their claims for damages, for the sum of* $300,000, *payable in drainage warrants.*"

And in further speaking on this matter the Court, at pages 144 and 145, said:—

"These warrants were to be issued not only in payment of the drainage plant but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out its contract with the Canal Company and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for $50,000, may be assumed to have been the greater part of the consideration.

* * * * * *

"It is scarcely necessary to say the fact that the city chose to pay $300,000 in 1876 for property which Van Norden bought in 1872 from the Ship Canal Company for $50,000, is not one which can be considered here. The Act of 1876, authorizing the purchase and the settlement of claims against the city, provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed and appraised the dredgeboats and machinery at $153,750, being twenty-five per cent. less than the original cost. He announced himself as unable to come to a conclusion with reference to the damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon not only to cover the value of the property of the plant, but *the exclusive franchise* under the Act of 1871, *and the claim for damages against the city.*"